Supreme Court, U.S.
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No. 09-1087

In The Supreme Court of the United States

WILLIS W. DAVID, JR.,

Petitioner,

v.

JACQUELINE M. DAVID,

Respondent.

On Petition For A Writ Of Certiorari To The Montana Supreme Court

BRIEF FOR UNIFORMED SERVICES FORMER SPOUSE PROTECTION ACT LIBERATION SUPPORT GROUP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether state courts may deviate from federal guidance designed to ensure equitable division in the award of military retirement pay to a former spouse in a divorce proceeding when the ability to divide comes from a specific grant of authority from Congress.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Uniformed Services Former Spouses Protection Act (USFSPA) Liberation Support Group (ULSG) is a non-profit organization, chartered expressly to deal with the impact of the USFSPA on personnel of the military uniformed services. ULSG members are active duty, retired, reserve and National Guard members of the uniformed services of both sexes as well as their spouses and other interested parties.

Service in the Armed Forces of the United States creates a special trust between service members and the federal government. Service members endure years of hardship during military service, separated from the comforts of home, friends and family, while relying on the federal government to provide the tools they need to serve. One of these is the freedom from inappropriate control by foreign governments and States of the Union.

Service members are all volunteers who serve overseas and within the borders of the United States, as needs of the Armed Services dictate. As such, members do not ultimately control where they are assigned, but may be sent involuntarily to various

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[1] Counsel for *amicus curiae* authored this brief in whole and no other person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. Petitioner provided with 10 day notice of *amicus* brief but respondent had by that time already exercised her right to respond and therefore waived right to object to *amicus* brief.

states and nations. However, as a result of actions taken in furtherance of federal service, they can be subject to the jurisdiction of courts of states other than those of their legal residence. A central premise to the concept of a federal military is that there cannot be significant differences in the treatment of service members among states in matters that interfere with federal control of the military forces.

This Court recognized the strong federal interests in the military retirement system in its decision in *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728 (1981), holding that the military retirement pay could not be divided by state courts. In response, Congress passed the USFSPA,[2] retroactive to the *McCarty* decision, to allow state courts to divide the military retirement/retainer pay in a divorce. This case challenges the ability of state courts to ignore guidance provided along with that authority to ensure the proper application of the USFSPA in a state divorce proceeding, thereby severing that special trust between service members and the federal government.

Amicus curiae ULSG accepts the factual basis provided by the petition and hereby incorporate these facts by reference.

This brief is submitted with the consent of the Petitioner; Respondent has exercised her right not to

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[2] Pub. L. No. 97-252, 96 Stat. 730 (1982) (codified at 10 U.S.C. §1408 (2006)).

respond and has thus waived her right to object to this brief.

SUMMARY OF THE ARGUMENT

This case presents a unique question with regards to the U.S. concept of federalism – federal military law versus state divorce law.

The retirement/retainer pay of the members of Armed Forces of the United States has been determined by this Court to be a very special type of compensation. Military retirement pay has more the character of a retainer pay than an actual retirement pay because the military retiree must conform to a number of conditions to receive it; these conditions are established by federal law, not state law. This pay was not subject to division in a divorce as established by this court until passage of the Uniformed Services Former Spouses Protection Act by Congress in 1982. The Federal Government, through its finance centers, has promulgated a procedure to quantify the amount that should be subject to division by a state court in a divorce proceeding.

State courts have jurisdiction over a divorce proceeding. However, when deciding issues on federal law, state courts do not have the expertise to fully understand the impacts of their decisions and are therefore in need of, and should follow federal guidance regarding questions of federal law. The Montana Supreme Court acknowledged that issues of federal

pay are handled differently by the states but held that such decisions should be left to the discretion of the local courts; such an interpretation cannot stand.

ARGUMENT

A. REVIEW IS NECESSARY TO ENSURE THAT FEDERAL MILITARY MEMBERS ARE PROTECTED FROM VARYING STATE INTERPRETATIONS OF FEDERAL LAW

Members of the uniformed services are part of the federal government and should be entitled to standard treatment by the states for matters regarding this status. Military members serve in many states, often involuntarily. The states have made widely varying applications of the USFSPA. *See* Ann K. Wooster, J.D., Annotation, *Construction and Application of Federal Uniformed Services Former Spouse Protection Act in State Court Divorce Proceedings*, 2003 A.L.R.5th 7 (2009). Allowing this discrepancy to continue unchecked violates the trust of the military members, thereby impacting federal concerns of readiness; when a state function substantially interferes with a federal one, the federal interest must preempt the state interest. *Boggs v. Boggs*, 520 U.S. 833, 844, 117 S. Ct. 1754, 1762 (1997). If federal review of such actions is not possible, then service members are left to the unchecked variances of state courts that can tread into areas of federal responsibility. Since state trial courts, often with the use of only martial masters, *see Witte v. Justices of the N.H. Supreme Court*,

831 F.2d 362 (1st Cir. 1987), are making decisions regarding the interpretation of federal military matters, federal oversight is constitutionally and logically indicated.

The interaction between the federal and state responsibilities in a military divorce is difficult. "A more complex mix of federal and state rules would be hard to imagine." Mark E. Sullivan, *Military Pension Division: Crossing the Minefield*, 31 Fam. L. Q. 19, 19 (1997). It is easy to define a balance regarding the USFSPA consistent with federalism whereas the states divide the pay as authorized by Congress but Congress, and by extension the federal government, retains the authority to define the character of military pay. However, in this case, the State of Montana has exceeded that authorization and upset this proper balance. Therefore, the Court should grant certiorari to reestablish and reassert the proper balance of interests consistent with the U.S. concept of federalism.

B. FEDERAL REVIEW IS APPROPRIATE BECAUSE THE FEDERAL GOVERNMENT HAS NOT INDICATED THAT IT INTENDS TO ABDICATE ITS RESPONSIBILITY IN THIS AREA OF LAW

The issue of division of the military retirement pay in a divorce is a difficult issue for federalism. Whereas states retain responsibility for family matters (divorce), *see Hisquierdo v. Hisquierdo*, 439 U.S.

572, 581, 99 S. Ct. 802, 808 (1979), the federal government is responsible for military matters. U.S. Const. art. I, §8. The federal government still retains this responsibility for retired service members who are still members of the military. *See United States v. Tyler,* 105 U.S. 244 (1882). After the Court's decision in *McCarty*, the USFSPA was passed to give states the authority to divide military pay as property in a divorce. 10 U.S.C. §1408(c). However, Congress included a number of limits on this authority, indicating that the federal government still retains overall control. 10 U.S.C. §1408(e). For this reason, the states should be restrained by federal interpretations as to the character of the military retired pay. The proper way to define the amount of federal military retirement pay subject to division in a state court divorce proceeding has been defined by the Department of Defense in its Financial Management Regulation to exclude amounts of retirement pay based on post-divorce longevity and rank increases. DoD Fin. Mgt. Reg., Vol. 7B, Chap. 29, paras. 290213, 290608 (2009). The regulations of the Defense Finance and Accounting System (DFAS) are expressions of the federal government's desire to maintain control over the federal aspects of military pay matters consistent with the U.S. Constitution.

C. STATES THAT FAIL TO FOLLOW THE FINANCE CENTER PROCEDURE COULD UNJUSTLY ENRICH A FORMER SPOUSE AT THE EXPENSE OF A MILITARY RETIREE IN VIOLATION OF THE FIFTH AMENDMENT

When the State of Montana failed to exclude from the marital estate the value that will be earned after the divorce, the State of Montana unlawfully and unjustifiably exceeded its authority, thereby denying Petitioner due process. Military retirement pay is set as a percentage of ending military pay, which is determined by the rank and length of service of the individual. 10 U.S.C. §1409. In this case, Petitioner and Respondent were divorced prior to the end of the military career, so the monthly retirement entitlement will further increase based on post-divorce service. The DFAS formula accounts for such an eventuality whereas the State of Montana formula used does not. Therefore, the order being appealed divides as marital property something earned post-marriage. It is well-settled that marital property does not accumulate after a divorce, with only the portion associated with the marriage considered to be marital property. 41 C.J.S. *Husband and Wife* §277 (2009). The authorization used by the State, 10 U.S.C. §1408(c), allows division of marital property but does not stand alone; instead, it is a part of a body of law joined with the implementing regulations. A State may only divide that which it has a legal basis for. *See McCarty v. McCarty*, 453 U.S. 210, 236, 101 S. Ct. 2728, 2743 (1981). Since the State of Montana has

ordered division of military retirement pay outside of the definition of marital property, this constitutes unjust enrichment for the Respondent. *See United States v. Miller*, 317 U.S. 369, 63 S. Ct. 276 (1943) (discussing the concept of unjust enrichment under federal law). By extending its powers over a citizen beyond lawful justification, a state denies due process in the denial of property to that citizen in violation of the U.S. Constitution. U.S. Const. amend. XIV. Therefore, the State of Montana has exceeded its authority and this action constitutes an unlawful action and violation of Petitioner's federal constitutional rights and review by the Court is necessary to prevent this injustice.

CONCLUSION

The USFSPA, in the text of the statute, fails to adequately protect federal military retirees in a divorce, so the Department of Defense has promulgated regulations to ensure just that. However, the courts of the State of Montana held that it may take advantage of a federal statute but yet not be bound by the amplifying secondary legislation to ensure that responsibilities assigned to the federal government by the Constitution are met. In its decision that is the subject of this appeal, the Supreme Court of Montana acknowledged the split in interpretation by the states over a matter controlled by federal law by specific grant of authority to the federal government by the U.S. Constitution. The Court should grant review of

this case to firmly examine this issue to ensure that states are not overstepping their boundaries to impermissibly and inconsistently interfere with the federal military pay system.

Respectfully submitted,

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